Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

JOHN DOE, et al.,
Petitioners

v.

EAGLE-UNION COMMUNITY SCHOOL CORPORATION, et al.

On Petition For Writ of Certiorari To the United States Court of Appeals For the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

John, Robert and Mary Doe

P.O. Box 30068

Indianapolis, Indiana 46230

317 695-6248

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QUESTIONS PRESENTED

1. Whether the U.S. Court of Appeals for the Seventh Circuit erred by failing to rule on John Doe's vacateur motion given district judge's non-disclosure of out-of-court relationships with parties and the irregular change of judge.

2. Whether the Seventh Circuit's rule, unique among the circuits, of refusing to allow appellate review of a district court judge's failure to recuse is unconstitutional, a denial of due process and irreconcilable with *Liljeberg v. Health Services Acquisition Corp* and *Liteky v. United States.*

3. Whether the Seventh Circuit erred by affirming the trial court's denial of attorney fees for the administrative hearing where John Doe primarily prevailed contradicting *Farrar v. Hobby.*

4. Whether the Seventh Circuit erred by finding certain of John Doe's educational claims moot due to his age of 20 contradicting *Honig v. Doe.*

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are John Doe, his parents Robert Doe and Mary Doe, each in their own right, Petitioners proceeding pseudonymously per statute and under administrative and court orders sealing personally identifiable information about the Student with disabilities. The Respondents are Eagle-Union Community School Corporation, James Krupowicz, Robert Wingerter, John Cravens, Charles Curtis and Paula Roeder in their official capacities as officers and Board Members; Howard Hull, Teran Armstrong and Nancy Tillett, in both their official capacities and their individual capacities; The State of Indiana; Sue Ellen Reed, in her official capacity as Superintendent of the Indiana Department of Education; Members of the Board of Special Education Appeals; Cynthia Dewes, Richard Therrien and Raymond Quisten in their official capacities .

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Petition for Writ of Certiorari

Petitioner John Doe, Mary Doe and Robert Doe respectfully pray that a writ of certiorari issue to review the orders and opinions of the U. S. Court of Appeals for the Seventh Circuit decided on March 9, 2001, April 4, 2001, and April 23, 2001 and the constitutionality of the Seventh Circuit's rigid adherence to their minority of one rule refusing to allow direct appeal of a district judge's refusal to disqualify despite the appearance of impropriety resulting from the district judge's non-disclosure of the out-of-court relationships to the parties and the switching of district judges by and to the judge with the non-disclosed relationships.

Citations of the Opinions

John Doe et al v. Eagle Union et al , No.00-2122 and 00-2690, decided March 9, 2001, and rehearing denied on April 23, 2001 ; 01-1707 denied on April 4, 2001,

John Doe et al v Eagle-Union et al, 101 F.Supp. 2d 707, (S.D. Ind., 2000).

Indiana Board of Special Education Appeals Article 7 Hearing No. 1007-98 decided August 19,1998 (IDELR 1998)

Eagle-Union Article 7 Hearing No. 1007-98 decided June 8,1998 (IDELR 1998)

Jurisdiction

The U.S. Supreme Court has jurisdiction to review on a writ of certiorari the orders and opinions of the United States Court of Appeals for the Seventh Circuit decided on March 9, 2001, April 4, 2001, and April 23, 2001 under 28 U.S.C.§ 1254(1). Application No. 01A54 was granted by Justice Stevens extending filing time until and including September 20, 2001.

Petitioners seek review of the Seventh Circuit recusal rule as irreconcilable with *Liteky v. United States*, 510 U.S. 540 (1994) and *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) and the

decisions of the U.S. Court of Appeals for the Seventh Circuit inconsistent with *Farrar v. Hobby,* 506 U.S. 103 (1992) and *Honig v. Doe,* 484 U.S. 305 (1988). The District Court had jurisdiction over John Doe's claims in the case based on 28 U.S.C. §1331 and 28 U.S.C. §1443 in that John Doe presented claims under the Individuals with Disabilities Education Act, 20 USC § 1400 *et seq* ("IDEA"), Section 504 of the Rehabilitation Act of 1973, 29 USC § 794 ("Section 504") the Americans with Disabilities Act, 42 USC §12100 *et seq* ("ADA") and the Due Process Clause of the Fourteenth Amendment through 42 U.S.C. § 1983. The U.S. Court of Appeals for the Seventh Circuit had jurisdiction over this matter as a consequence of 28 U.S.C. §1291.

Constitutional Provisions, Statutes and Regulations Involved

28 U.S.C..§ 144 requires a federal judge to "proceed no further therein" upon a "timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice... in favor of any adverse party "

28 U.S.C. § 455 (a) requires a federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

20 USC § 1400 *et seq* ("IDEA") allows for Student to petition the federal district court for attorney fees for obtaining relief in administrative hearings conducted under IDEA §1415(b)(2).

29 USC § 794 ("Section 504") and

42 USC §12100 *et seq* ("ADA")

require that "No otherwise qualified person with a disability in the United States...shall solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be *subjected to discrimination* under any program or

activity receiving Federal financial assistance." (Emphasis added.)

42 USC § 1983 Due Process Clause of the Fourteenth Amendment

Statement of the Case

John Doe, a qualified student with disabilities, and his parents petitioned the U.S. District Court for an award of attorney fees incurred at the IDEA administrative hearing 1007-98 where John Doe primarily prevailed. Docket No. 98-1294 Record 6, 83, and 91. The Student also sought judicial review of the School's uncontroverted use of subjective criteria in the School's determination to exclude the otherwise qualified Student from extracurricular activities. Inclusion in extracurricular activity was necessary for John Doe's free, appropriate public education and was listed as a component of John Doe's School developed individual learning plan. Record 1.

The case, filed in U.S. District Court on September 18, 1998, was assigned to a district court judge. Record 1. The case was later irregularly reassigned by and to a district court judge who had prior out-of-court relationships with both School and State Defendants. Record 11, App. 40. The district judge did not reveal to the pro se Student and parents the district judge's prior out-of-court relationships with both School and State Defendants. The handwritten switching of judges was discovered by the Student during the preparation of the appeal. The Student subsequently learned of the undisclosed privileged relationships of the district judge to both School and State Defendants at the judge's law firm Bose, McKinney & Evans. App. 41.

The Student requested the Court of Appeals to vacate the district court judge's summary judgment decision granting summary judgment for School and State Defendants. The Student also requested the

Court of Appeals to vacate the district court judge's denial of the Student's motion for summary judgment and fee petition. The Student asked the Court of Appeals to appoint a special judge to rule on the summary judgment motions and fee petition.

The Student's vacateur motion included a properly sworn affidavit of bias and documentation of the switching of judges and the prior privileged relationships of the district judge to both School and State Defendants giving rise to the appearance of impropriety.

The Court of Appeals for the Seventh Circuit directed the Student to make the vacateur motion to the district judge pursuant to the Seventh Circuit's Rule 57. The district judge did not respond to the issues raised by the Student's motion and refused to consider or address the appearance of impropriety created by the non-disclosure of the prior out-of-court relationships of the district judge to both School

and State Defendants and the switching of judges. The Student learned that the Court of Appeals, unique among the circuits, would only consider a district court judge's failure to recuse through a petition for a writ of mandamus. See *USA v Boyd* (7th Cir. 2000) Therefore, the Student filed a petition for a writ of mandamus. The Court of Appeals not only found the Student's compensatory educational claims moot contravening every prong of the *Honig v. Doe* 484 U.S. 305 (1988) test for justiciability but also affirmed the district judge's denial of attorney's fees contradicting the holding of *Farrar v. Hobby,* 506 U.S. 103 (1992).

The Court of Appeals denied the petition for writ of mandamus and the Student's Petition for Rehearing. The Student files this petition for writ of certiorari to the U.S. Court of Appeals for the Seventh Circuit to review the orders and opinions of the U. S. Court of Appeals for the Seventh Circuit

decided on March 9, 2001, April 4, 2001, and April 23, 2001 and the constitutionality of the Seventh Circuit's recusal rule.

Summary of Argument

The Seventh's Circuit's case law on judicial recusal does not permit appellate review of a district court judge's refusal to recuse and is irreconcilable with *Liljeberg*. The Seventh Circuit stands alone in its rigid adherence to a rule that results in an unconstitutional denial of due process.

John Doe should be awarded fees under *Farrar v. Hobby*. The Student is a prevailing party for fee purposes having primarily prevailed at the administrative level by obtaining most of the sought-after relief. With a decision that the use of *subjective* criteria to exclude the Student from extracurricular activity was discriminatory, the Student will have completely prevailed.

John Doe's compensatory educational claims

not moot by *Honig* test. This Court held in *Honig* that if a student with disabilities had not yet graduated from high school and if a student with disabilities was of an age that students without disabilities could attend public school, the claims of the student with disabilities were not moot.

Argument

I. Seventh Circuit's Recusal Rule Unconstitutional

The U.S. Court of Appeals for the Seventh Circuit's has singular practice among the circuits of refusing to allow appellate review of a district court judge's failure to recuse. "Our cases hold that appellate review of a judge's refusal to disqualify himself under this section is possible only by petitioning the appellate court for mandamus *before* trial. " *USA v . Boyd,* Circuit Judge Ripple, dissenting (emphasis added.) In his dissent, Circuit Judge Ripple also points out that the U.S. Court of Appeals for the Seventh Circuit has an incongruous

view of sec. 455(a).

"This circuit's view has been that sec. 455(a) is intended to protect against the appearance of impropriety and that, once the proceedings in the district court have been completed, the harm sec. 455(a) seeks to prevent has already occurred. "Thus we have required litigants to bring mandamus petitions to cure potential problems under sec. 455(a) and to prevent a potentially tainted trial from ever taking place.

No other court of appeals has followed our approach. See Kenneth M. Fall, Note, *Liljeberg v. Health Services Acquisition Corp.*: The Supreme Court Encourages Disqualification of Federal Judges Under Section 455(a), 1989 Wis. L.Rev. 1033,1056. Some circuits have rejected explicitly our position. The Third Circuit has

> said that mandamus is the preferred method of appeal, but allows review on direct appeal because it may provide a 'partial cure' to any harm to the public perception of the judiciary. See *In re School Asbestos Litig..*, (77 F.2d 764,777 n.12 (3rd Cir. 1992). Id.

The Seventh Circuit's rule, unique among the circuits, requiring mandamus as the only avenue for review of a judge's failure to recuse is unconstitutional when the district judge does not disclose out-of court relationships with the parties. The fundamental requirement of due process is an impartial adjudicator. A judge who has out-of court privileged relationships with parties and irregularly *takes the case* from the originally assigned judge creates the appearance of impropriety. The Seventh Circuit erred by failing to rule on John Doe's motion for vacateur of the district judge's decision or address the irregular change of judge. App.

28 U.S.C..§ 144 Requires a federal judge to "proceed no further therein" upon a "timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice... in favor of any adverse party ". The district judge was given a properly certificated, timely, given the judge's non-disclosure of the out-of-court relationships, and sufficient affidavit of bias. The district judge should been disqualified. There was a reasonable appearance of impropriety created by the judge's previous privileged relationships with many of the parties and the switching of judges on the case by and to the judge. The district judge chose to not to respond to the issue of the appearance of impropriety caused switching of judges preventing any review.

II. John Doe entitled to fee award under *Farrar*

The Seventh Circuit erred by affirming the trial court's denial of attorney fees for the administrative hearing because John Doe primarily prevailed under

Farrar v. Hobby, 506 U.S. 103 (1992). John Doe was awarded the occupational therapy evaluation that he sought at the hearing along with transition planning and vocational rehabilitation services. Independent Hearing Officer's (IHO) Orders App. Additionally the School was permitted to withdraw its request to reclassify the Student for a special education placement. Id.

The Student did not prevail on one issue, the School's extracurricular exclusion of the otherwise qualified Student on the basis of subjective criteria. The Student argued in his motion for summary judgment that the use of *subjective* criteria to exclude the Student from extracurricular activity required by his School-developed plan was patently discriminatory. But the IHO did not agree.

> "He was provided the same opportunity to try out for the basketball team as all other students without disabilities and was assessed

> in a "fair and essentially uniform application of the same *subjective* and objective factors utilized in the consideration of other students in the selection of the high school basketball team. " IHO Finding App. emphasis added.

The Student argued that the School's refusal to include the Student on the basis of the relevant bona fide *objective* qualifications of the Student was also discriminatory as the School did not keep records of points scored, points assisted, free-throw percentages or speed rank in the speed drills . App.

The Eagle-Union Community School Corporation identified the student John Doe as a qualified individual with disabilities under 29 USC § 794 ("Section 504") in 1997 and awarded the Student a Section 504 learning plan which his parents had sought since 1994. However, the School never fully implemented the Section 504 plan. Record 1. Despite the existing 504 plan with accommodations

for the Student's tremor disability, the Student was being required to do extensive fine motor tasks which were impossible due the Student's manual limitations. Id. The parents requested the School to provide an occupational therapy evaluation so that the Student could be better accommodated as to his manual and fine motor skill limitations caused by the Student's upper extremity tremor disorder. Record 1. In December of 1997, the School then revived its abortive 1994 plan to reclassify the Student as a special education student under IDEA. Both Student and his parents objected to the School's attempted reclassification under IDEA and requested an IDEA Article 7 hearing to avoid the School's proposed IDEA reclassification evaluation and to obtain an occupational therapy evaluation and transitional services for John Doe under Section 504. Id.

John Doe prevailed, achieving the requested

relief . On June 8, 1998, the State of Indiana appointed Independent Hearing Officer ordered that the Student be given the parentally requested occupational therapy evaluation and transition services. 98-1007 Hearing Officer's Orders. App.
The Independent Hearing Officer allowed the School to withdraw its proposal to evaluate the Student for a reclassification and special education placement under IDEA. Id.

III. John Doe's claims viable under *Honig* test

The Seventh Circuit erred by finding John Doe's compensatory educational claims moot due to John Doe's age of 20 despite his lack of a high school degree. App. Compensatory education claims of students with disabilities without a high school degree do not become moot while those students remain of an age that students without disabilities are permitted to attend public school. *Honig v. Doe* 484 U.S 305 (1988).

The State of Indiana's policy permitting all non-disabled students between 18-22 to attend school until they had completed their high school graduation requirements but allowing Schools discretion to discontinue education of students with disabilities 18 or older was struck down in *Evans v. Tuttle,* 613 N.E. 2d 854 Ind. App. (1993). John Doe is 20 years old. The Court of Appeals for the Seventh Circuit on its own motion asked the parties for supplementary briefing as to whether the Student's claims were now moot. The Student informed the Court of Appeals of the continuing justiciability of the Student's claims because as per *Honig v. Doe* and *Evans v. Tuttle,* the Student had not graduated from high school nor had the reached the age of twenty-two and remained a resident of Indiana. Affidavit, Supplemental Brief . Additionally, equitable relief of payment for AAU basketball league as a substitute activity for the

substitute activity for the School's 1997-1998 school year exclusion of the Student from extracurricular activity was sought.

In *Honig v. Doe,* this Court held that a 24 year old respondent's claims were moot since eligibility included disabled children between the ages of 3 and 21. However, the case was found justiciable with respect to respondent Smith, who exactly like John Doe continues to be eligible for EHA educational services since he is currently only 20 and has not yet completed high school.

It is likely that John Doe will again be subjected to the same type of exclusion in any Indiana school district in which he is enrolled, in light of the the BSEA's affirming a statewide policy giving schools discretion to exclude students with disabilities using subjective criteria.

> "In light of the ponderousness of review procedures under the Act, and the fact that an

aggrieved student will often be finished with school or otherwise ineligible for EHA protections by the time review can be had in this Court, the conduct Smith complained of is "capable of repetition, yet evading review." Thus his EHA claims are not moot. Respondent Jack Smith, however, is currently 20 and has not yet completed high school. Although at present he is not faced with any proposed expulsion or suspension proceedings, and indeed no longer even resides within the SFUSD, he remains a resident of California and is entitled to a "free appropriate public education" within that State. His claims under the EHA, therefore, are not moot if the conduct he originally complained of is "`capable of repetition, yet evading review.'" Murphy v. Hunt, 455 U.S. 478, 482 (1982)." *Honig v. Doe*, 305,317.

Conclusion

John Doe, Mary Doe and Robert Doe submit that the writ of certiorari to the U.S. Court of Appeals for the Seventh Circuit should be granted. Because the Seventh Circuit's recusal rule denies due process, the rule should be found unconstitutional. The petitioners seek an award of attorney fees for primarily prevailing at the administrative hearing and pray that the Supreme Court will find that the School's use of and the State's affirmation of subjective criteria to determine if a student with disabilities is "otherwise qualified" is a tautological proposition and patently discriminatory. The petitioners ask the Supreme Court to remand the case to the Seventh Circuit for disposition consistent with *Liljeberg, Farrar* and *Honig*.

App.1

In the United States Court of Appeals

for the Seventh Circuit

Chicago, Illinois 60604

April 23, 2001

Before Hon. Frank H. Easterbrook, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

Hon. Diane P.Wood, Circuit Judge

Nos. 00-2122, 00-2690

John Doe,et al

Plaintiffs -Appellants

v.

Eagle-Union Community School Corp.,et al.,

Defendants - Appellees

Appeals from the U.S. District Court

for the Southern District of Indiana, Indianapolis

Division No. IP 98-1294-C-B/S

Sarah Evans Barker Judge

ORDER

Plaintiffs-Appellants filed a petition for

rehearing en banc on March 23, 2001. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition is therefore DENIED.

In the United States Court of Appeals

for the Seventh Circuit

Chicago, Illinois 60604

Submitted March 29,2001

Decided April 4, 2001

Before Hon. Frank H. Easterbrook, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

Hon. Diane P.Wood, Circuit Judge

No.01-1707

John Doe,et al

App. 3

Petitioners

Application for Writ of Mandamus, Southern District of Indiana, Indianapolis Division

No. 98-1294

Sar ah Evans Barker, Judge

The Following are before the court:

1. Plaintiffs-Appellants' Petition for Writ of Mandamus, filed on March 23, 2001 by the pro se petitioners.

2. Plaintiffs-Appellants' Brief in Support of Writ of Mandamus, filed on March 23, 2001 by the pro se petitioners.

IT IS ORDERED THAT# 1 is DENIED.

In the United States Court of Appeals

for the Seventh Circuit

Chicago, Illinois 60604

Submitted February 5, 2001*

App. 4

Decided March 9, 2001

Before

Before Hon. Frank H. Easterbrook, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

Hon. Diane P.Wood, Circuit Judge

Nos. 00-2122, 00-2690

John Doe,et al

Plaintiffs -Appellants

v.

Eagle-Union Community School Corp.,et al.,

Defendants - Appellees

Appeals from the U.S. District Court

for the Southern District of Indiana, Indianapolis

Division No. IP 98-1294-C-B/S

Sarah Evans Barker Judge

ORDER

John Doe (Doe), a disabled student who attended Eagle-Union Community School in Zionsville, Indiana, and his parents sued defendant

school officials under s number of federal claims for relief after Doe was cut from the high school basketball team and school officials proposed placing him in homebound special education classes. The plaintiffs also alleged violations of their procedural rights under the Individuals with Disabilities in Education Act (IDEA) 20 U.S.C. §§ 1400-1491. The district judge granted summary judgment for the defendants. We have consolidated this appeal (number 00-2122) with the plaintiffs' appeal of the district court's denial of attorney fees to the plaintiffs (number 00-2690) We affirm the denial of attorney's fees in number 00-2690, and vacate the judgment on the merits in number 00-2122 and remand with instructions to dismiss the case as moot.

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*After examing of the briefs and records we have concluded that oral argument is unnecessary. Thus

these appeals are submitted on the briefs and records. See Fed. R. App. P 34 (a).

The parties in this case have a long contentious history over the proper education to provide to John Doe, who suffers from clinical depression and tremors. School officials, concerned about Doe's poor grades and isolation from his classmates, made numerous attempts between 1994 and 1997 to evaluate Doe for special education services under IDEA, a federal law that entitles disabled students to a "free appropriate public education." See 20 U.S.C. § 1400(d). Doe's parents refused to consent to any evaluation under the IDEA, but in August of 1997 they allowed the school to classify Doe as disabled under the Rehabilitation Act, see 29 U.S.C. § 794 and to implement an alternative learning plan.

In the fall of 1997 Doe tried out for the high school basketball team, but he was one of five to seven players who were cut. Also during that fall,

school officials continued to attempt to evaluate Doe. When school officials proposed in December of 1997 that the parties explore the the possibility of home schooling, Doe's parents felt they were being threatened and that school officials were trying to reclassify Doe under IDEA. Doe's parents responded by requesting a due process hearing before an independent hearing officer (IHO), as provided for under the IDEA. see 20 U.S.C. § 1415 (b)(6) (f)(1). At the hearing, Doe's parents asseted that the school officials had failed to follow the proper procedures in attempting to evaluate Doe, had threatened them by the proposed home schooling, and had discriminated against Doe by cutting him from the basketball team. The hearing officer rejected these claims, and on appeal, see 20 U.S.C. § 1415 (g), the Board of Special Education Appeals affirmed.

In September 1998 the plaintiffs filed this suit

under IDEA, Rehabilitation Act, Americans with Disabilities Act and 42 U.S.C. § 1983, alleging that school officials denied Doe his "free appropriate public education" and had discriminated against him based on his disabilities. Soon after filing the suit, the plaintiffs moved out of the school district. When the school discovered that the plaintiffs no longer lived within the area covered by the school district., they expelled Doe as allowed under Ind. Code 20-8.1-5.1-11. The district court granted summary judgment on the merits to the defendants.

On appeal the plaintiff's reassert that school officials violated the IDEA and the Rehabilitation Act by failing to provide Doe with a "free appropriate public education." We do not have jurisdiction to consider the merits of the plaintiffs' claims, because this case is moot. The case at hane involves disputes over proposals for Doe's education developed when Doe was a 17-year old junior in high school. Doe is

now 20, and he no longer attends Eagle-Union school. Furthermore, the school district agreed to drop its propsal to evaluate Doe before the independent hearing officer. We fail to see how continued litigation over a perceived denial of a free appropriate public education three years ago at a school Doe no longer attends can provide meaningful relief to any such party, and these claims are therefore moot. See e.g., Stotts v. Community Unit Sch. Dist. No. 1, 230 F.3d 989,991 (7th Cir. 2000); Board of Educ. of Oak Park v. Nathan R. , 199 F.3d 377,381; Board of Educ. of Downers Grove Grade Sch. Dist. No. 58 v. Steven L. , 89 F. 3d 464, 467-68 (7th Cir. 1996) (Challenge to educational plan for fifth grade student was moot where student had since advanced to eighth grade and agreed to an educational plan with different school district).

In appeal number 00-2690 the plaintiffs assert that they are entitled to attorney's fees because they

were the"prevailing party" in the proceedings before the hearing officer. See 20 U.S.C. § 1415 (i)(3) (b). The plaintiffs argue that they prevailed at that stage of the proceedings because they reached an agreement with school officials that the officials would not attempt to carry out a full evaluation of Doe under IDEA.

The plaintiffs' attorney's fees claim is not moot because it is related solely to the administrative proceedings. See Nathan r., 199 F.3d at 381. Their apeal fails, however, because a party that wins small, tactical victories, but loses on the main issues can not be considered a prevailing party. See Linda W. v. Indiana Dept. of Educ., 200 F.3d 504,507 (7th Cir.1999); Jodlowski v. Valley View Community Unit Sch. Dist. # 365-U, 109 F.3d 1250, 1254 (7th Cir. 1997). The hearing officer ruled against plaintiffs on their claims; the plaintiffs' only " victory " was obtaining an agreement from the school officials to drop a proposal for a full evaluation of Doe. In

exchange , however, the plaintiffs had to agrree to a lesser evaluation. Furthermore, by refusing to allow Doe to be evaluated under IDEA, the plaintiffs waived any claim they might be able to raise under that Act. Therefore, the district court did not abuse its discretion in denying attorney's fees because even if the Does won a small victory in stopping the evaluation of Doe, they did not win the larger battle behind their complaints. We therefore VACATE the judgment of the district court in appeal number 00-2122 and REMAND with instructions to dismiss the case as moot, and AFFIRM the denial of attorney's fees in appeal number 00-2690.

U.S. District Court

Southern District of Indiana

Indianapolis Division

John Doe

Mary Doe

Robert Doe

Plaintiffs

Eagle-Union Community School Corp.,et al., No. IP 98-1294-C-B/S

Defendants

ENTRY

The Plaintiffs' renewed motion for attorney fees, filed on April11,2000, has been considered.

The Plaintiff' renewed motion for attorney fees preumes that their earlier motion for attorney fees remained pending following entry of final judgment. This is not the case, because "final judgement necessarily denies pending motions." Dunn v. Truck World, Inc 929 F.2d 311,313 (7th Cir. 1991).

Apart from the foregoing moreover, the plaintiffs are not entitled to recover their attorney fees as a result of either proceeding, in which plaintiffs were not the prevailing parties, or of proceedings

before a hearing officer occurring in February , March and May of 1998, which resulted in a decision on June 8, 1998. The directions which the hearing officer issued did not make the plaintiffs prevailing parties even in a limited sense in the administrative proceedings. Jodlowski v. Valley View Community Unit School District #365-U, 109 F. 3d 1250 ,1254 (7th Cir.1997)

Based on the foregoing, therefore, the plaintiffs' renewed motion for attorney fees, filed on April 11, 2000. is denied.

IT IS SO ORDERED.

/s/

Sarah Evans Barker Judge

Chief Judge

United States District Court

Date: May 30,2000

App.13

U.S. District Court

Southern District of Indiana

Indianapolis Division

John Doe

Mary Doe

Robert Doe

Plaintiffs

v. No. IP 98-1294-C-B/S

Eagle-Union Community

School Corp.,et al.,

Defendants

JUDGMENT

The court , having this day made its Entry, IT IS THEREFORE ADJUDGED that judgment entered for the defendants and against the plaintiffs, and that the plaintiffs take nothing by their complaint. To the extent the decision of the Indiana Board of

Special Education Appeals in No. 10078-98 is challenged herein, that decision is affirmed.ss

/s/

Sarah Evans Barker Judge

Chief Judge

United States District Court

Date: March 30,2000

BEFORE THE INDIANA

BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of the Article 7 Hearing No. 1007-98

Eagle-Union Community School Corporation

STATEMENT OF JURISDICTION

The Student involved in this case was not and is not eligible for special education services under the Individuals with Disabilities Education Act (IDEA),

20 U.S.C. §1400 *et seq.*, as implemented in Indiana through the rules of the Indiana State Board of Education, 511 IAC 7-3 *et seq.* ("Article 7"). However, as in the predecessor to this case, the parties continue to invoke both the IDEA and Sec. 504 of the Rehabilitation Act of 1973. The Independent Hearing Officer (IHO) assigned to this case specifically stated he would exercise concurrent jurisdiction under 34 CFR§104.36 (Sec. 504). Accordingly, as we held in *Eagle-Union Community School Corporation*, Article 7 Hearing No. 941-97, 26 IDELR 106 (BSEA 1997), the Board of Special Education Appeals (BSEA) has jurisdiction.

The IHO's Written Decision: Findings of Fact and Conclusions of Law

Hearing was conducted over five (5) days: February 10, March 23, March 24, May 19, and May 20, 1998. Both parties were represented by counsel. The IHO established on May 20, 1998, a post-hearing schedule

for the submission of written closing arguments and any responses thereto. On May 21, 1998, the LEA withdrew its request to evaluate the student under IDEA, rendering moot the parent's failure to comply with the IHO's orders. By a "confidential order" of June 8, 1998, the IHO identified the independent evaluators qualified to conduct an occupational evaluation of the student. The IHO issued his written decision on June 8, 1998. The decision contains thirty-six (36) findings of fact, twenty-four (24) conclusions of law, seven (7) orders, and a "Comment to Both Parties," the latter an admonishment regarding the depth of "animosity, distrust and lack of cooperation between the two parties," followed by an encouragement of the parties to work together for the benefit of the student.The IHO's written decision noted the student was seventeen (17) years old and completing his junior year at the LEA. The student has had an

Alternative Learning Plan (ALP) since the 1994-1995 school year. The ALP has detailed various modifications and supports. On August 27,1997, it was determined the student was disabled under Sec. 504. The ALP was revised to include twelve (12) intervention strategies. The parent agreed to the ALP. During the early part of the 1997-1998 school year, the student received three B's and one C with two incompletes, but by November, the student received one B with five (5) incompletes. At some time prior to December 12, 1997, the parent requested an occupational therapy (OT) evaluation. LEA personnel viewed the request as a request for an initial evaluation under Article 7 to determine whether the student qualified for special education and related services under IDEA. On December 12, 1997, the LEA's high school principal completed a referral for evaluation, citing the parent's request for an evaluation of the student's tremors, the student's

excessive absenteeism, and the student lack of academic progress. The LEA's high school guidance counselor, on December 15, 1997, offered to reconvene the Sec. 504 conference to "explore the possibility of homebound instruction for [the student], since he cannot come to school on a regular basis." The guidance counselor also made the offer due to the student's declining grades and increasing incompletes. However, the Sec. 504 conference was never held. Despite numerous attempts from December 12, 1997, to January 7, 1998, by LEA officials to contact the parents, the parents never contacted LEA personnel to discuss the evaluation and be informed as to their procedural rights and recourse. The educational evaluation has never been conducted. The LEA did not pursue permission to evaluate the student through IDEA due process hearing procedures.

Notwithstanding the student's declining grades and

excessive absenteeism, the student tried out for the high school basketball team during the fall of the 1997-1998 school year. The varsity basketball coach was supportive of the student, encouraging him to try out for the team and permitting the student to attend additional sessions due to missing a few try-out sessions. The coach was aware the student had a disabling condition, but was not sure what the condition was and did not observe any physical limitations on the student's ability to participate in basketball. Although the parent was to provide information to the coach regarding the student's disability, she did not do so. The coach had previously coached the student during the student's ninth grade year. The coach, in consultation with his assistants, selected twenty-four (24) students for the varsity and the junior varsity teams, utilizing both objective and subjective criteria as well as his knowledge and experience regarding the sport. The

student was not selected. There was no evidence presented at the hearing regarding the student's basketball ability in relation to the twenty-four selected, nor was there any evidence presented that anyone from the LEA prevented the student from making the team. The student was provided an equal opportunity to make the team. The student did not suffer discrimination when he was cut from the roster along with five to seven other students. The IHO reiterated the concessions of the school as to "informed consent" and the constitution of a multidisciplinary team being affected by a given student's suspected disabling conditions. The IHO also reiterated the student and his parents were not denied access to due process. As to whether the LEA threatened the student and his parents, this issue involved the December 15, 1997, offer of homebound by the high school guidance counselor. The IHO noted the parent provided no evidence that anyone

perceived the letter to be a threat. The IHO concluded his fact-finding by detailing agreements between the parties as to assistive technology evaluations and OT evaluations, neither of which are implicated in this appeal. From these Findings of Fact, the IHO concluded the student is a qualified individual with a disability for school-attendance purposes, 34 CFR §104.3(k)(2), due to his clinical depression and aforementioned tremors. The student and his parents were provided due process rights under both Sec. 504, 34 CFR §104.36, and IDEA, 511 IAC 7-15-5(j). The student was not prevented from participating in interscholastic sports solely because of his disability. He was provided the same opportunity to try out for the basketball team as all other students without disabilities and was assessed in a "fair and essentially uniform application of the same subjective and objective factors utilized in the consideration of other students in the selection of the

high school basketball team." The IHO reiterated the December 15, 1997, letter was not a threat. The resulting orders related, to a great extent, to the assistive technology and OT evaluations, which are not at issueon appeal. As noted above, the IHO concluded his written decision with an admonishment to the parties coupled with an encouragement to work more cooperatively in the future.

APPEAL

On June 17, 1998, the student, by his parent, requested information on how to secure an extension of time in order to prepare and file a Petition for Review under 511 IAC 7-15-6, should the parent decide to appeal. General Counsel for the Indiana Department of Education responded that same date, informing the parent of the specific

procedures for requesting such an extension. The parent, on June 22, 1998, did request such an extension of time. The BSEA granted the requested extension of time, permitting the parent until the close of business, July 24, 1998, to file a Petition for Review. The record in the proceedings was copies and forwarded on July 15, 1998, to each member of the BSEA.

The Petition for Review

The parent timely filed a Petition for Review on July 24, 1998. Although vague, it is concerned mainly with the IHO's determinations and conclusions regarding the selection of the basketball team. The following are the specific Findings of Fact and Conclusions of Law to which exception is taken. The parent's assertions of error are indicated immediately following each cited Finding of Fact (FOF) and Conclusion of Law (COL). The parent's exceptions are restated where possible.

FOF 15: The varsity basketball coach encouraged the student to try out for the basketball team and, due to the student missing a few try-out sessions, allowed the student to attend additional sessions. The coach hoped the student would make the team. (Parent asserts the record supports a finding the varsity basketball coach used subjective criteria to exclude the student even though he was better or equal in ability to students who made the team.)

FOF 16: The varsity basketball coach was aware of the student's 504 determination, but not the student'sspecific disability, but did not observe during the try-out sessions any handicapping conditions adversely affecting the student's try-out. The Student's mother was to provide the coach with information as to the student's handicaps but failed to do so. The coach had previously coached the student during his 9 thgrade year. (Parent disputes whether it is her responsibility to provide

information to the coach when the LEA had the information.)

FOF 17: The varsity basketball coach selected the twenty-four students for the varsity and junior varsity teams, whom he determined, based upon his and other assistant coaches' observations at the try-out sessions, were the best basketball players (i.e.,not necessarily the fastest or best in one facet but the best all-around players), and most likely to help the team to be successful. The coach believed the student did not have the skills at the level of the twenty-four students selected for the team, based upon his observations, using subjective and objective components, and his past knowledge and experience in coaching basketball.

(Parent asserts that athletes do not exist to help the team. Rather, interscholastic sports are to help develop students.)

FOF 18: There was no evidence presented by which

the Hearing Officer could evaluate the student's performance at the try outs in comparison to the other boys who tried out for the basketball team and were either selected for the team or cut. (Parent asserts this conflicts with FOF 22, which indicated "The coach gave an equal opportunity, if not more so, to the student to make the team and did not discriminate against the student.")

FOF 19: There was no evidence presented that anyone wanted to prevent the student from making the high school basketball team. (Parent asserts this conflicts with the "comment to both parties," presumably the first paragraph of this comment. For ease of reference, the IHO's "comment" reads as follows: "This Hearing Officer has been a hearing officer for eighteen years and heard numerous cases, but never observed such animosity, distrust and lack of cooperation between two parties. It is a very sad situation when the needs of the student become

secondary to the battles and skirmishes of the parents and school personnel. Such needless bickering must cease if this young man is to have a successful and enjoyable senior year in high school."

FOF 20: The junior varsity basketball coach agreed that the twenty-four players selected for the varsity and junior varsity teams were the best basketball players who tried out for the varsity and junior varsity teams. (Parent asserts the record does not support this finding.)

FOF 21: The student herein was not selected as one of the best twenty-four players and was cut from the team along with approximately five to seven other students. (Parent complains there is a lack of objective criteria upon which the coaches could make such a determination.)

FOF 22: The coach gave an equal opportunity, if not more so, to the student to make the team and did not discriminate against the student. (The parent asserts

the IHO exceeded his jurisdiction by determining there was no discrimination.)

COL 7: For the purposes of provisions of [Section] 504 prohibiting discrimination against an "otherwise qualified handicapped individual" in federally funded programs "solely by reason of his handicap," an "otherwise qualified person" is one who is able to meet all of the program's requirements in spite of his handicaps. Southeastern Community College v. Davis, 99 S.Ct. 2361, 442 U.S. 397 (1979).

(The parent asserts that only measurable, objective criteria should be used in assessing basketball ability, and that subjective criteria is inherently discriminatory.)

COL 8: Sec. 504, by its terms, does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that

an"otherwise qualified handicapped individual" not be excluded from participation in a federally funded program "solely by reason of his handicap," indicating only that mere possession of a handicap is not permissible grounds for assuming an inability to function in a particular context. Ibid., 442 U.S. at 405, 99 S.Ct. At 2366.

COL 9: In this case, the term "otherwise qualified" does not mean that the student must be selected for the basketball team despite his handicap; it prohibits the non-selection of the student when the student has the skills to make the team but is not selected.

(Parent objects to both Conclusions of Law. This is based on the parent's belief the student has requisite basketball skills.)

COL 10: The school coach could consider such other relevant subjective and objective factors as he deemed appropriate consonant with a fair and essentially uniform application of the same subjective and

objective factors utilized in the consideration of other students in the selection of the high school basketball team.

COL 11: The student was given the same opportunity to try out for the high school basketball team as was provided to students without disabilities.

COL 12: The decision as to who was qualified for the team as a result of the basketball tryouts was a matter left to the discretion of the varsity basketball coach, with input from the junior varsity coaches.

(Parent disagrees with these three Conclusions of Law, asserting the record supports contrary conclusions.)

COL 13: Based upon the evidence presented, the student was graded in a non-discriminating manner, based on the coaches' subjective and objective criteria, as were all the other students trying out for the basketball team. (Parent asserts this conflicts with FOF 18, which addresses the parent's failure to

present any evidence of the student's basketball ability vis-a-vis the other students who were selected or who were cut from the team.)

COL 14: The Office for Civil Rights complaint concerning the Alpena Public School District [Education of the Handicapped Law Report, EHLR, 257:565 (OCR 1984)] is not applicable to the facts in this case. In Alpena, the student was not selected to the team because of his handicapping condition, even though he was evaluated by the coach to be a better basketball player than four other students who made the team. Here, the coach was aware of the student's [Sec.] 504 plan, encouraged the student to try out, did not observe any handicapping problems during the try outs, previously had known the student, hoped he would make the team, but deemed he did not have the requisite basketball skills needed for the team. The school did not violate Section 504 or Article 7 when the student was cut from the high

school basketball team.

(Parent asserts the IHO erred as a matter of law and fact. The coach was not knowledgeable about the student's disabilities. Any decision with respect to the student's participation in interscholastic sports should have been made by his Sec. 504 conference.)

COL 15: The letter of December 15, 1997 by the guidance counselor was not a threat but merely offered to reconvene a [Sec.] 504 conference and of possible services which the school believed may be appropriate due to the student's increased and excessive absences, falling grades, and increased incomplete class work. (Parent asserts the IHO's conclusions violates the "least restrictive environment" requirement.)

COL 16: The student and his parents were provided their due process rights pursuant [to] the regulations for Section 504 and Article 7 in that this hearing was held, they had the right to and did present evidence,

Appand they were given the opportunity and did cross-examine the school's witnesses and there was no limitation on their due process rights.

(Parent asserts the LEA attempted to delay due process, but does not state anything further in this regard.) COL 20: There is no real current case or conroversy about the 1997-1998 high school basketball team. The season has already concluded and that controversy is moot. However, this Hearing Office hereinabove determined that no discrimination occurred during the 1997-1998 basketball team selection, since such a controversy may occur in the future (i.e., 1998-1999 basketball season). (Parent asserts evidence supports an opposite conclusion, entitling the student to remediation for wrongful exclusion from the basketball team. The "remediation" would apparently consist of "compensatory basketball mentoring in adult directed remediation in the fall of

1998 prior to basketball season.") It cannot be determined whether the parent objects to any specific order. The parent does include a number of proposed Findings of Fact, Conclusions of Law, and Orders that she believes the IHO should have rendered.

The LEA's Response to the Petition for Review.TheLEA timely responded on July 29, 1998, reiterating the points it made in its written Closing Argument to the IHO. However, the LEA notes that the parent "consistently refused to address the issues" as delineated, and that the Petition for Review is in similar fashion. The LEA also argued that the parents presented no evidence to contradict the testimony of the coaches. Neither parent testified, nor did the student. As to the specific issues, the LEA maintains the IHO was correct in finding the letter of December 15, 1997, did not constitute a threat; there is no disagreement that a parent has the right to give

informed consent prior to an initial evaluation under IDEA; there is no dispute the suspected disabilities of a student dictate composition of a multidisciplinary team; there is no evidence the LEA attempted to limit the parents' access to due process; and the LEA did not violate any State or Federal law when the student was cut from the high school basketball team.

Review by the Board of Special Education Appeals

The BSEA notified the parties by an order dated August 5, 1998, that review would be conducted on August 18, 1998, but without oral argument and without the presence of the parties. The parties were notified by letter of August 12, 1998, that a discrpancy appeared in the BSEA's above-referenced order. Under 511 IAC 7-15-6(j), the BSEA has thirty (30) calendar days from the filing of the Petition for Review to conduct its review. Because the thirtieth day falls on a weekend, the first business day will be August 24, 1998, a Monday. This is the

date by which the review must be conducted and a written decision mailed. The BSEA convened on August 18, 1998, in Bainbridge, Indiana. All three members were present. Each member had read the record in its entirety, as well as the Petition for Review and the Response thereto. After consideration of the record as a whole, the BSEA, by unanimous vote, determined the following *Combined Findings of Fact and Conclusions of Law* and *Orders.*

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The BSEA has jurisdiction in this matter.2. M.S. is seventeen years old (D.O.B. 12/8/80). He has clinical depression and experiences occasional tremors. He is considered to have a disability for the purposes of Sec. 504 of the Rehabilitation Act of 1973. The LEA has complied with the procedures for evaluating the student's educational needs under Sec. 504 and has provided him an appropriate education. M.S. is not

presently eligible for special education and related services under IDEA and Article 7.

3. The parent requested on January 5, 1998, a due process hearing under IDEA and Article 7. The initial issue involved evaluation under IDEA.

4. Although the parent requested an occupational therapy (OT) evaluation, the student had not been previously identified as eligible for special education and related services. OT is a related service. 511 IAC 7-13-5(b)(5). However, any related service is not provided in isolation but must be supplementary and complementary to a special education program. 511 IAC 7-13-5(a); 511 IAC 7-3-44. The LEA was, therefore, justified in initiating a referral for an educational evaluation under 511 IAC 7-10-3 because the student had not previously been determined eligible for special education services.

5. Because the parties raised issues of discrimination, it was wholly within the IHO's discretion to

determine the student experienced no discrimination.

6. Although comments in the final written decisions of IHOs are unusual, the BSEA—following review of the record as a whole, and especially the transcript of the proceedings—finds the IHO was wholly justified in making his comments.

7. The parent fails to state any reason for disturbing the Findings of Fact, Conclusions of Law, or Orders of the IHO. The record supports the IHO's determinations.

ORDERS

1. The written decision of the IHO is upheld in its entirety.

2. Any matters raised by the parent and not specifically discussed above are hereby overruled or dismissed, as appropriate.

Date: August 19, 1998 /s/ Cynthia Dewes, Chair

Board of Special Education Appeals

Appeal Right

Any party aggrieved by the decision of the Indiana Board of Special Education Appeals has thirty (30) calendar days from receipt of this decision to seek judicial review in a civil court with jurisdiction, as provided by I.C. 4-21.5-5-5.

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LAURA A. BRIGGS

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN DOE, et al.

Plaintiffs,

v.

EAGLE-UNION COMMUNITY SCHOOL CORPORATION, et al.

Defendants.

B/S

CAUSE NO. IP98-1294-~~TG~~

APPEARANCE

Comes now the firm of BOSE McKINNEY & EVANS, by Thomas E. Wheeler, II, and enters its appearance on behalf of the Defendants, Eagle-Union Community

GOVERNMENTAL LAW. Bose McKinney lawyers represent state and local governments and governmental agencies in a variety of litigation, employment and other matters. We understand the political and public relations side of issues in the public sector as well as the legal concepts.

EDUCATION LAW. Bose McKinney is a recognized authority on Indiana education law. For more than four decades, we have worked closely with Indiana school corporations. We assisted in drafting the statutes that form the basis for the organization of school corporations and that still govern virtually every aspect of public school operations and have counseled school officials in every part of the state.

[redacted]overnments and governmental agencies need lawyers who are familiar with constitutional and statutory restrictions and who can work under often intense public and media scrutiny. Bose McKinney & Evans' lawyers have learned these skills by representing more than 180 public bodies ranging from school boards to the State of Indiana.